Access to Justice for Disadvantaged Communities

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Before focusing upon the development of legal aid and the history of Law Centres, more specifically, this chapter starts by summarising different definitions and perspectives on social justice and their varying implications for social welfare. Among others, Piachaud has pointed to ‘the very ambiguity of the term “social justice” – a “feel good” term that almost all can subscribe to’ (Piachaud, 2008, p 33). While the pursuit of social justice ‘has been the driving force behind much, perhaps most, social change’, in Piachaud’s view (Piachaud, 2008, p 50), ‘opinions about what is fair and just have differed, and will probably always do so’, he concludes.

Although similarities have been identified, there have also been significant differences of approach, both in theory and in practice. There has been widespread agreement about the importance of basic political liberties and fair process, together with widespread agreement about the importance of social rights, such as access to education, if citizens are to benefit from political rights, as Marshall argued (Marshall, 1950). But there has been far less agreement about what, if any, inequalities would be justifiable, and on what basis.

Rawls’ A theory of justice (Rawls, 1971) has been centrally significant here as an influence on subsequent debates, sparking criticisms from varying perspectives. Deriving his arguments from processes of reasoning – as to what principles we would choose if we did not know what our own position and life chances were going to be – Rawls himself claimed that his conception of the principles of justice stood independently of any particular moral or religious views. He summarised the outcomes of these processes of reasoning as follows: ‘All social primary goods – liberty and opportunity, income and wealth, and the social bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these goods is to the advantage of the least favoured’ (Rawls, 1971, p 73). This was an argument not for defining justice in terms of absolute equality but, rather, that insofar as the outcomes were unequal, these inequalities could be justified according to Rawls’ criteria. In his view, such an approach could form the basis for developing strategies for the promotion of justice across different types of societies. Or could it?

Rawls himself was focusing upon the rules for society as a whole, rather than upon the rules underpinning individual choices. Once the implications of his approach are unpacked and applied to individuals, however, Rawls’ theory of social justice becomes more contentious from varying perspectives, as subsequent critics have argued. For example, Dworkin has argued that the outcomes could
be unfair if the least-favoured were actually disadvantaged as a result of their own choices (Dworkin, 1981). As Wolff has pointed out, developing this type of argument, ‘Some may be badly off because they are unable to work, or unable to find work. But others may have chosen to do no work. Can it be fair to tax the hardworking for the benefit of those who are capable of hard work, and equally talented, but choose to laze around instead?’ (Wolff, 2008, p 19). This type of argument has been prevalent in recent debates on welfare reform and the issue of so-called scroungers under successive governments, illustrating some of the political differences underpinning debates on rights and justice in general, and welfare rights more specifically.

Others, including Sen (1992), have developed alternative responses to Rawls’ approach, focusing instead upon the capabilities that people need in order to achieve effective functioning. While this capabilities approach implies the need for access to services such as education in order to develop these capabilities, Sen has himself refrained from spelling out the requirements in detail (although others such as Nussbaum (2003) have taken this further). This was because, in Sen’s view, different societies need to engage in democratic ways of specifying what such functioning entails, in their own particular contexts. He pointed to the importance of taking account of both personal characteristics – sex, health/ability/disability and so on – and social aspects, including social norms and environmental factors. Unless these were taken into account, equalities of opportunity would fail to amount to equality in terms of overall freedoms, resulting in unjustifiable inequalities.

As Young, among others, has similarly pointed out, there has been a tendency for ‘public and private institutions in contemporary liberal democratic societies to reproduce sexual, racial and class inequality by applying standards and rules in the same way to all who come under their purview’ (Young, 2008, p 78), regardless of their unequal structural positions. ‘Treating as equal those who are unequal does not produce equality’ (Kennedy, 2005a, p 4). Equalisation for women in relation to the law has ‘almost invariably been towards a male norm’, is has been argued. (Kennedy, 2005a, p 3).

Justice, according to Fraser, requires a three-dimensional approach, then, taking account of:

- issues of redistribution (to address socio-economic inequalities)
- issues of recognition (challenging the hidden and not-so-hidden injuries of class, race and gender, such as social and cultural marginalisation and the lack of social respect) and
- issues of participation (challenging marginalisation and exclusion from political processes), including denial of ‘the chance to press first-order justice claims in a given political community’, the right to rights and the right to claim those rights (Fraser, 2008, p 280).
This last point has particular relevance for the issues addressed in this book, as will be argued in subsequent chapters. Each dimension has particular relevance too, in terms of race and ethnicity, as well as in terms of other forms of structural inequalities.

Without engaging in these debates in detail, the point to emphasise here is simply this: that the concept of justice, whether for individuals or societies, has been and continues to be contested, both within and between societies. As Sandel has opined more generally, the question is whether ‘the principles of justice that govern the basic structure of society can be neutral in respect to the competing moral and religious convictions its citizens espouse’ (Sandel, 1998, p 2). In his view, concepts of justice vary, depending, for example, upon whether societies place greater value on individual liberties and freedom of choice or whether they place greater emphasis on more collective, majoritarian approaches. Neither of these – liberal or communitarian – approaches represents satisfactory alternatives, in any case, according to Sandel, who concludes that ‘rights depend for their justification on the moral importance of the ends they serve’ (Sandel, 1998, p 3).

These ends have varied in different contexts over time. Previous approaches to social justice, as developed by such thinkers as R.H. Tawney, envisaged it in terms of promoting greater equality of outcomes (Bryson and Fisher, 2011). In contrast, more recent approaches have linked the promotion of social justice to economic goals (Bryson and Fisher, 2011). While the language of the Labour Party’s Commission on Social Justice referred to the importance of the ‘equal worth of all citizens’ and the requirement ‘that we reduce and where possible eliminate unjustifiable inequalities’ (Commission on Social Justice, 1994, p 1), the report also emphasised that ‘There will be no solid economic success without more social justice’ (Commission on Social Justice, 1994, p 18). Far from ‘being inimical to the neo-liberal values of economic efficiency, competitiveness and growth, social justice was actually a prerequisite for their effective realisation’, according to Bryson and Fisher (2011, p 5) – a means towards economic goals rather than an end in itself. Bryson and Fisher criticised the ‘decisive shift away from the idea that inequalities are an unjust product of class society and towards the New Labour idea that individuals should be given opportunities and responsibilities within such a society’, with equal opportunities to compete for unequal outcomes – the view that was evidenced in the commission’s report, they argued (Bryson and Fisher, 2011, p 5).

This touches on debates of central importance in relation to Law Centres, their aims, ethos and values, as will be suggested later. How far might social justice agendas be compatible with the operation of a market economy (Doyal and Gough, 1991; Burchardt and Craig, 2008)? Marxists have tended to critique rights–based approaches in such terms, going as far as to reject the possibility of achieving rights and justice within the context of capitalist societies, marked as they have been by inherent structural inequalities (Blackledge, 2012). As Blackledge, among others, has pointed out, Marx himself argued on occasion that workers’ ‘appeals to justice were pointless, since there are rival conceptions of justice formed by and
informing the life of rival groups’ (Blackledge, 2012, p 38) – in this case workers and their employers. Considerations of morality and justice were to be put aside in capitalist societies, it was argued, along with detailed consideration of what types of inequalities might be justifiable in socialist and communist societies. To address these issues in the here and now was to indulge in utopian fantasies.

While these types of argument have been influential within Marxist debates, others have challenged such dichotomous thinking. It was possible to engage with issues of rights and justice without abandoning a Marxist analysis of the underlying causes of inequality and social injustice. ‘I think one can have one’s cake and eat it – in this case at least’, Callinicos has argued (Callinicos, 2001). By implication, then, rights for individual citizens could and should be pursued, but they needed to form a part of wider strategies for social change, addressing structural inequalities, taking account of the impacts of discrimination and oppression, past as well as present (including the legacies of slavery and racism, for example, as well as the legacies of discrimination in terms of gender, sexual orientation, age, religion and disabilities, to name some of the most obvious).

There is not the space here to explore these debates in further detail. The point to emphasise is simply this, that they have implications for Law Centres’ distinctive aims, ethos and values, as will be argued later. Were Law Centres solely focused upon taking up individuals’ cases, within the context of existing structural inequalities? Or were they also concerned to challenge such inequalities, taking test cases and campaigning as part of wider strategies to promote more broadly defined approaches to social justice? It was these wider strategies that were becoming particularly threatened, it will be suggested, which is not to underestimate the threats to their very survival too.

Public policies to promote access to justice

As the previous chapter has outlined, access to justice emerged as a central question in earlier debates on the establishment of the welfare state, illustrating the wider significance of these issues in the context of current debates on the future of welfare more widely. More specifically, the history of legal aid has been similarly linked (Sanderson and Sommerlad, 2011). As Geoffrey Bindman pointed out in an article explaining ‘What made me a legal aid lawyer’): ‘before the Second World War access to legal services by those who could not afford to pay for them was largely dependent on charity’ (Bindman, 2002, p 512). While there was some provision for poor people to obtain representation in criminal cases, this was more limited in civil cases. Nor was there access to advice, except where this was given on a voluntary basis. Pro bono help was provided by what were known as ‘poor men’s lawyers’ through legal aid societies. This was the situation that was to be addressed by the establishment of the Legal Aid Scheme in 1949. ‘A new dawn was promised’, Bindman (2002, p 515) explained, ‘in which equality before the law would be made real by the elimination of personal wealth in determining access to legal advice and representation.’ Access to justice was recognised as a
fundamental right, then, in parallel with the rights to education, healthcare and social security, through the establishment of the welfare state.

Building upon the Beveridge Report’s analysis, as the previous chapter explained, the post-war settlement was to tackle the causes of poverty and related social problems comprehensively through universal services, provided as rights, rather than on the basis of individualised charity. As already argued, T.H. Marshall’s concept of citizenship included these social rights, alongside political rights and obligations (Marshall, 1950). As Marshall wrote, the civil element of citizenship was, in his view, ‘composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts’ and ‘the right to justice’. And he continued: ‘the last is of a different order from the others, because it is the right to defend and assert all one’s rights on terms of equality with others and by due process of law’ (Marshall, 1950, pp 10–11).

This point was emphasised by Sanderson and Sommerlad in their discussion of access to justice under New Labour governments. As they explain, not only are all other rights ultimately dependent on the right and ability to litigate on terms of equality with others, ‘but the need of the disempowered for this right exceeds that of other citizens’. This was because, in their view, ‘poor people are more likely to get into trouble with the law, come into contact with state agencies, suffer violence and abuse, experience precarious and sometimes dangerous employment, live in poor quality housing and be exploited by, for instance, private landlords’ (Sanderson and Sommerlad, 2011, p 179). Civil justice problems were often linked to broader social, economic and health problems and power imbalances, they pointed out. Furthermore, ‘the poor are more likely to feel powerless and not entitled to take action’ (Sanderson and Sommerlad, 2011, p 180). Access to justice, then, was a key plank of the welfare state settlement, aiming, as the Beveridge Report did, to tackle the causes of poverty and related social ills.

In practice, though, the post-war settlement in relation to legal aid fell short of these aspirations, as did the rest of the welfare state more generally. By the mid-1960s, as the previous chapter explained, poverty was rediscovered as a persistent challenge, along with the limitations of other aspects of the welfare state. The limitations of legal aid in terms of the aspiration for equality of access to justice, regardless of the ability to pay, were similarly exposed (Abel-Smith, Zander and Brooke, 1973) – with housing and welfare problems as key areas of demand (reflecting, once again, the links with wider social inequalities).

This was the context in which the US’s War on Poverty inspired interest in Britain, demonstrating alternative approaches to tackling these persistent challenges (Marris and Rein, 1967). The Office of Economic Opportunity (OEO), which emerged with this War on Poverty, established a Legal Services Program in 1965, hiring 2,000 full-time salaried lawyers in the first two years of its operations (reaching a total of some 6,000 by the late 1970s) and bringing legal representation to poor people in deprived neighbourhoods in many cities, towns, rural areas, migrant camps and Indian reservations (Johnson, 1999). While this represented a
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massive increase in access to legal services for individuals, the OEO’s operations were by no means confined to this, however. Great emphasis was also placed upon pursuing collective approaches, taking class actions, taking up test cases and promoting legislative and administrative changes, in the interests of the poor.

In the early days these initiatives were, arguably, making a considerable impact. According to Kilwein (1999) legal services attorneys won important victories in the courts that reshaped the American welfare system, especially the programme that replaced the Aid to Dependent Children programme. ‘Both conservative and liberal observers agree’ that the Legal Services Program ‘greatly increased the number of people receiving social welfare benefits’ between 1967 and 1974, he argued (Kilwein, 1999, p 48), winning judicial decisions, in essence ‘forcing the government to live up to its Great Society promises to the poor’ (Kilwein, 1999, p 49). From the start this had been about an activist approach to the provision of legal services, aiming in the process to change the law for the benefit of the poor.

Whatever the underlying motives of the politicians who launched the War on Poverty (including their interests in reaching out to new potential voters for the Democratic Party, among Black Americans migrating from the deep South to the cities of the North), and whatever the underlying interests of the professional lawyers represented by the American Bar Association, the American welfare system was better funded for a period and ‘the poor had a greater voice in its design’ (Kilwein, 1999, p 45). The US approach to the provision of legal services to the poor was part of a broader programme of social reform, then, concerned with wider issues of social justice and social change.

Unsurprisingly, perhaps, given shifts in the political landscape, the Legal Services Program subsequently came under attack. This was not primarily as a result of attempts to contain expenditure, it has been argued (Johnson, 1999; Kilwein, 1999), although that was a factor too, even though the actual sums involved were relatively small in the context of overall budgets. More significantly, the programme came under attack because legal services lawyers were beginning to challenge vested interests, including major employers, landlords, insurance companies, bankers and the healthcare industry, not to forget the challenges to public institutions themselves. By the mid 1990s, when another Democratic president, Bill Clinton, was on the back foot, Kilwein argued, he signed legislation removing the right for publicly funded legal services to engage in policy issues affecting the poor and forbidding the pursuit of any new class action suits. Overall, these changes represented what has been described as ‘a complete repudiation of the ideals of the legal services practice developed by the pioneers of the programme’ (Kilwein, 1999, p 57), illustrating the contested nature of public policies to promote access to justice more generally.

But this is to leap forward to the future. In the late 1960s and early 1970s, the US Legal Services Program was seen as a potential model for addressing the shortcomings of legal aid in Britain – understandably, given the programme’s impacts at that time, both in terms of providing services to individual clients and in terms of tackling the causes of poverty and injustice more widely.
The case for the provision of legal aid on the basis of the US model was described in the Society of Labour Lawyers’ pamphlet *Justice for all*, published in 1968. This provided an outline of potential ways forward. Law Centres developed on such principles were to focus exclusively on the legal problems of poor people. In this way they could offer an alternative mode of service delivery, justifying the employment of salaried lawyers. This would be in contrast to the legal aid model of paying private practice lawyers on a case-by-case basis for such cases as they undertook for clients who were financially eligible under the scheme. In theory, this looked logical and attractive. If all the clients were eligible anyway, there was no point in the laborious process of sending individual approval applications to the legal aid authorities and submitting invoices for the work done for each client.

In the event, however, the government of the day was not interested in setting up a network of such centres in Britain and it was left to more local initiatives. In 1970 the first Law Centre was set up in North Kensington, London, soon to be followed by Law Centres in Paddington, Islington and Camden, resourced with local authority and other sources of funding. Although the Law Society was initially doubtful or even hostile, by the end of the 1970s (with support from the then Lord Chancellor) an accommodation had been reached and the Society came round to the view that, far from being a threat, Law Centres were actually generating additional work for private practice (Smith, 1997). The total number of Law Centres rose to 62, at their peak (with funding from a range of sources, including inner-city regeneration initiatives, as well as some funding from central government for a limited number of centres).

Like their counterparts in the US, Australia and Canada (Zemans and Thomas, 1999), these Law Centres aimed to close the gap between the law and individuals and communities, especially individuals and communities in deprived areas, taking up test cases with wider implications and undertaking public legal education, as well as providing information and advice to individual clients. They were to provide specialist legal advice and representation in social welfare law, including welfare rights, disability rights, immigration and asylum, housing and homelessness, employment, community care and all forms of discrimination including racial discrimination. While these areas of law were the ones most commonly provided, a smaller number of Law Centres also offered advice in mental health, education rights and young people and children’s rights, depending on the local need for these particular services.¹

At this point it should be emphasised that Law Centres developed their remits in response to local needs, as these emerged, adding areas of provision when required – and dropping others, such as juvenile crime and personal injury, when demands for these were being met elsewhere. There were issues of prioritisation to be addressed here. In the early days Law Centres developed their remits in the context of increasing opportunities for promoting rights as social welfare law and equalities legislation developed in the 1970s and 1980s. These changes opened up new opportunities, potentially increasing public awareness of the possibilities for taking up and pursuing rights through legal processes.
Legal services had not previously been made available to the public outside the for-profit structure of private practice firms, and lawyers had had only that structure within which to pursue their careers. Law Centres also offered new vocational opportunities, typically organised on a collective basis, reflecting their commitment to democratic, participative values and ways of working, with democratic accountability to the communities that they were there to serve. In the early days of relative independence for community Law Centres they were closely linked, in many instances, to local community organisations and social movements, actively engaged in community work. Subsequent chapters consider these aspects in more detail.

These early days were succeeded by more challenging times, however. Funding had always been relatively precarious, with low levels of local government funding and minimal direct central government funding. So, as funding from these sources began to dry up, Law Centres started to operate the legal aid scheme, submitting applications in behalf of eligible clients and invoicing for the work, thus guaranteeing themselves a source of funding from the statutory scheme. But the costs of legal aid were growing, overall, and this became a matter of political concern as part of wider pressures to contain public expenditure more generally.

Although the growth in legal aid expenditure was actually far more pronounced in respect of private firms than it was for Law Centres (which were facing increasing competition from advice agencies as well as from the private sector), by the 1990s a considerable proportion of their income was coming from legal aid casework. Even before the Carter reforms, Law Centres faced major challenges, then, as governments focused upon devising ways of managing costs and obtaining efficiency savings, including via competitive contracting processes. By this time a number of private practice firms had discovered that a reasonable living could be made by concentrating almost exclusively on legal aid work – a far cry from the situation in the 1970s, when legal aid had constituted a tiny proportion of the work of most more broadly based practices. To government, there was no logical distinction to be drawn, then, between these legal aid firms and legal aid-dependent Law Centres.

**The Carter proposals for reform**

Having failed to contain costs effectively (particularly the costs of criminal legal aid, rather than the costs of civil legal aid, incidentally) the New Labour government commissioned Lord Carter to come up with proposals to gain more control over these costs. In the event, it was the proposals that impacted on civil legal aid that became the focus for reform, rather than the more costly criminal legal aid costs.

The Carter Report of 2006 critiqued the way in which legal aid work was being administered and contracted and suggested that there was ‘scope for greater efficiency in the way that not for profit organisations deliver legal advice services’ (Lord Carter of Coles, 2006, p 45). The previous model of funding, the report continued,
may encourage inefficiency, as by paying for hours worked rather than cases completed it may encourage some caseworkers to spend more time on cases than is strictly necessary. This could mean fewer clients helped, and in an environment where ever more innovative means are being found to help more people access legal advice, it is essential that a good quality service is secured that provides maximum value for money. (Lord Carter of Coles, 2006, p 45)

This report, which was endorsed by the Legal Services Commission (LSC), was followed by the introduction of the Unified Contract in 2007 – a new system by which Law Centres and other legal aid providers were to be contracted and paid. These contracts were to be awarded on the basis of competitive tendering processes for bulk contracts.

With the introduction of the Unified Contract, payment was no longer based on the hours that were actually worked for particular cases but on fixed fees for different types of cases, calculated by the LSC itself. Specifically, the fixed fee scheme meant that the providers of legal advice, such as Law Centres, were being paid between £160 and £250 per case, depending on the area of law (for example employment, debt, welfare benefit and housing). There was provision for ‘exceptional’ cases to be paid at higher rates, but this applied only to cases that consumed more than three times the amount of time allowed for the regular fixed fee cases. As subsequent sections argue in more detail, this fixed fee system was very controversial, critics arguing that most of the Law Centres’ cases fell between these two levels, requiring more time than the regular fixed fee allowed but falling short of the requirements for payment at the higher ‘exceptional’ level.

**Legal aid reforms 2007, following the Carter report in 2006**

The Carter reforms – a ‘market-based approach to reform’ – have been described as exemplifying New Labour’s attempt to ‘reconcile a discourse of social justice with the techniques of New Public Management and the parallel discourse of commitment to the citizen as a public consumer’ (Sanderson and Sommerlad, 2011, p 178), ‘nuanced to the point of self-contradiction’ (Sanderson and Sommerlad, 2011, p 183). In Baroness Helena Kennedy’s view, ‘the so called reforms to legal aid served only to significantly weaken it’ (Kennedy, 2009, p vii).

In summary, government efforts to contain costs were to focus upon increasing marketisation (through the competitive tendering process), coupled with what has been described as the micro-management of legal aid transactions through the administrative systems required by the commissioning agent, the LSC. Advice was being measured in terms of what might be readily measurable – the volumes of advice units provided – rather than in terms of impact on the lives of individuals in disadvantaged communities or the contribution of legal aid to the promotion of access to justice more generally. The implications, it has been argued, were that ‘poor people’s problems could be worth only two or three
hours of a paralegal’s time, and no more’, reducing legal aid to a ‘sink service for people on means-tested benefits’ (Sanderson and Sommerlad, 2011, p 194). This, Sanderson and Sommerlad concluded, corresponded to Crouch’s characterisation of neoliberal reforms as involving the residualisation, distortion and degradation of public sector services more generally (Crouch, 2011).

As subsequent chapters argue, there were potential challenges here for Law Centres, which, despite this increasingly challenging neoliberal climate, were aiming to preserve their varied but distinctive contributions to the goal of access to justice for all, regardless of the ability to pay. These distinctive contributions have been summarised (Smith, 1997) as including the following:

• reaching minority communities (and opening up access to legal careers to wider constituents in the process)
• supporting effective campaigning for social justice,
• taking up issues of collective concern in communities
• pursuing test cases to challenge discrimination and
• promoting public legal education and preventative approaches more widely.

These were the types of distinctive contributions that had characterised the provision of legal services as part of the US War on Poverty, rooted in wider strategies for social change and increasing social justice in the US and elsewhere (Regan et al, 1999). But none of these distinctive contributions was fundable under the Carter reforms, which focused solely upon the funding of units of advice and directly related case-work activities. The reforms were based upon a relatively narrow conception of access to justice, focusing upon individuals’ concerns rather than on taking a more collective approach to addressing the underlying causes of poor people’s legal problems as part of wider strategies for social justice.

Potential issues for legal professionals

As Burdett’s study of Law Centres (Burdett, 2004) demonstrated, challenges of funding and administration could be located within broader challenges to the welfare state. As Chapter One has already argued, these policy shifts were part of wider agendas to increase efficiency and enhance consumer choice – using market mechanisms to control the behaviours of public sector employees and public service professionals. ‘Everyone who works in the public sector, lives in the same household as a public-sector worker, or who has children of school age, lives in the shadow of the anxious, inspectorial culture that promises to visit the shame of failure upon us … Governments have not wished to trust professionals, and thus they have opted to control them’, it has been argued (Cooper, 2008, p 39, quoted in Bryson and Deery, 2011, p 107).

The point is absolutely not to suggest that professionals in general, or Law Centre staff more specifically, should not be publicly accountable. As Paterson and Sherr, among others, have argued, quality, value for money and efficient management
are rarely off the agenda (Paterson and Sherr, 1999) – nor should they be. Rather, the question is whether the increasing use of market mechanisms represents the most appropriate or even the most effective way of ensuring the achievement of these goals. Were they even counter-productive?

Burdett’s study of Law Centres questioned whether they might be. Were the next generations of staff and volunteers being formed in such a different context that the public service ethos was at risk of being undermined? Was motivation increasingly pragmatic and individualistic? Were volunteers more concerned with developing their CVs, for instance, rather than with focusing upon campaigning for access to justice for all? These concerns formed part of wider processes of questioning about neoliberalism’s long-term impacts, including its impacts upon professionalism and professional values.

Was the neoliberal emphasis upon individual choice empowering service users and driving public service modernisation, as successive governments claimed it was? Or was the very notion of ‘public value’, together with the public service ethos itself, being undermined by these processes of marketisation and posing new challenges for those concerned with professional ethics and values (Banks, 2004; Hoggett et al, 2009; Benington and Moore, 2010)? The following chapter explores in more detail the contested notions of professionalism and the public service ethos in the context of increasing marketisation. This sets the framework for discussing the dilemmas that were being posed for Law Centre staff and volunteers, in subsequent chapters. How were these dilemmas being addressed and, in terms of the emotional labour involved, at what costs?

Before we move on to these debates, the potential implications of the proposed reforms – and professional reactions to them – need to be summarised more specifically, so as to set the context more precisely. The Law Society had already expressed concerns about the Carter proposals before they were implemented, arguing that the fixed fee system would reduce the supply of lawyers prepared to undertake legal aid work, encourage cherry-picking (that is, taking on only the cases that could be resolved most easily within the scheme’s time allocations) and impact most seriously on the most vulnerable clients (Law Society, 2006). Private lawyers also submitted critical responses to the LSC consultation, as the following extract demonstrates, arguing that ‘the scheme you propose will prejudice vulnerable and disabled clients, especially those with mental difficulties, most of whom we represent, as their cases take longer to prepare…. [It] will also discriminate against clients from minority ethnic groups where language barriers often mean it takes twice as long to prepare and advise on their cases’ (quoted in Sanderson and Sommerlad, 2011, p 188).

It could, of course, be argued that ‘they would say that, wouldn’t they?’, since lawyers (sometimes described in the mass media as ‘fat cat lawyers’ profiting from legal aid) stood to lose out financially from the fixed fee system.

Abel’s study of the legal profession in England and its responses to pressures for increasing marketisation (Abel, 2003) provides detailed evidence illustrating both sides of the argument. Lawyers understandably resented the ways in which
they were being portrayed by politicians. Debates on proposals for reform, back in the Thatcher years, had presented them as suspect and ‘shameless’ (Abel, 2003, p 86), committed to restrictive practices in order to further their own professional interests, rather than to safeguarding their clients’ best interests. This was part of wider attacks on professions at that time for what Abel described as a mixture of motives, ideological attacks based on the view of professional organisations such as the Bar Council and the Law Society as forms of trade unions (that is, promoting restrictive practices), plus concerns with cost control and populism. Abel wrote that ‘some voters disliked lawyers even more than Thatcher’ (Abel, 2003, p xiii).

The election of the New Labour government in 1997 might have seemed to promise greater commitment to legal aid (although no new money was actually promised). But attempts to eliminate restrictive practices were still firmly on the agenda. Even before its election, New Labour had produced a justice policy that included references to the need to reduce the scope for what was described as the wide abuse of legal aid by ‘unreasonable litigants and greedy lawyers’ (Abel, 2003, p 273), and accusations that lawyers were seeking to protect their vested interests. This was the background to New Labour’s attempts to apply public service modernisation strategies to the legal professions.

But was there any justification for these types of criticism? Was professional self-regulation actually working in the best interests of clients and in the best interests of society at large? By 1998 there was recognition that all was not well within the professions themselves, with the New Law Journal predicting the end of self-regulation (Abel, 2003, p 405). The battle against legal aid cuts could have been won, it was argued, if the Law Society had set itself to root out restrictive practices earlier. While for some the problem was that there had not been sufficiently vigorous opposition to the government’s proposals, for others the problem was also the profession’s failure to set its own house in order. There were, in addition, criticisms of past failures to address sexism and institutional racism in the professions, pointing to the under-representation of women in the Law Society’s Council, as judges or as partners in law firms, for example. It was argued that these institutional biases impacted on women and black and ethnic minorities before the courts, where myths and stereotypes were disfiguring the legal process (Kennedy, 2005a).

While critics such as Kennedy pointed to the importance of addressing these issues, this was absolutely not such as to endorse caricatures of all lawyers as ‘greedy fat cats’. On the contrary, there were significant differences within the profession in terms of the rewards to be reaped – and who was reaping them. For instance, while 50% of law students were female by the beginning of the 21st century, the majority, Kennedy argued, were being ‘steered towards public service law, by which I mean fields largely funded out of legal aid’. ‘The men make career choices much more related to money and prestige and head for high-rewarding areas of practice’, she continued, but far from embarking upon careers as potential ‘fat cats’, ‘women find their place doing poor folks’ law’, the least rewarded areas of legal practice (Kennedy, 2005a, p 2).
There is not the space to go into these debates in any detail. The point is simply to emphasise the importance of taking criticisms of the professions seriously and focusing upon ways of ensuring their accountability – while discounting the populist rhetoric of some of their opponents. These criticisms potentially applied to professionals such as lawyers. But lawyers were also concerned with challenging the decisions of officials and, indeed, the decisions of professionals providing other services too. Who, then, was guarding the guardians? Once again, the question was not whether but how accountability mechanisms could be most effectively ensured – via the increasing use of market mechanisms or via strengthened forms of democratic accountability, including accountability to service users and their surrounding communities?

For Law Centres, the Carter proposals posed these challenges in very particular ways, as subsequent chapters explore in more detail.

Before we move on to these, however, two other elements of the proposed changes needs to be considered in summary: the attempt to bring legal services together to develop more joined-up approaches and more recent legislation reducing the scope of legal aid more generally.

**Community Legal Advice Centres and Community Legal Advice Networks**

While the Carter reforms of 2007 have undoubtedly had far-reaching effects on Law Centres, there have been other changes too, impacting on the ways in which Law Centres have been operating. Even before the implementation of the Carter reforms, after the publication of the consultation paper *Making legal rights a reality* in 2005, the LSC had set out to pilot a scheme that aimed to develop partnerships among legal service providers. This scheme sought to build Community Legal Advice Centres (CLACs) in urban areas and Community Legal Advice Networks (CLANs) in rural areas in order to offer legal advice in more integrated and cost-effective ways. The LSC’s objective was that this ‘joined-up approach’ (LSC, 2005) would be ‘run through a lead supplier’ who would then act as an interface with the LSC. This, so the consultation paper argued, ‘would reduce transaction costs on all sides and would allow the delegation of some LSC functions to the lead supplier’ (LSC, 2005, p 41).

Although the idea of collaborative working and creating partnerships had widely been positively received, there were concerns about the ways in which the CLACs and CLANs were to be implemented (Hansen, 2006). A response from the Advice Services Alliance² (ASA, 2005) to the LSC’s 2005 consultation paper critiqued the plans of the LSC for being inadequately researched and for lacking details on implementation and costs. The ASA further questioned the LSC’s proposal as not including immigration and asylum law within social welfare law.

The main concern put forward by the ASA, however, was that the top-down approach to the implementation of CLACs failed to take into appropriate consideration the strong community links and local knowledge of existing
providers. There were fears that many advice agencies might ‘go up the wall or survive in subsistence form’, as Hynes and Robins put it, if they were not included in the CLAC or CLAN (Hynes and Robins, 2009, p 76). In short, while there were already ambitions to develop joined-up approaches to the provision of legal advice, there were also major concerns. In the view of Hynes and Robins, for example: ‘The CLAC initiative combines the best and worst of recent policy thinking on legal aid. The central idea to have better local planning of services is right but the project appears to be compromised by a crude and divisive tendering process with little respect for the providers’ (Hynes and Robins, 2009, p 75). Chapter Six considers in more detail the issues involved in attempts to promote collaboration in the face of increasing pressures for competition.

More recent legislative changes

The proposals for the introduction of CLACs and CLANs posed potential challenges, then, in addition to the Law Centres’ earlier concerns about the implementation of the Carter reforms more generally. More recently, the policy context has again shifted significantly, as the Coalition government has developed its own proposals for further reform. In particular, the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) (passed as an Act in 2012) had potentially major implications for Law Centres’ future funding and viability, especially for those most reliant on legal aid funding. This was because the legislation set out to reduce the scope of legal aid as well as to change the eligibility criteria and the fee structure. In total, the Ministry of Justice expected to make savings of up to £350 million on the legal aid budget, which then amounted to a little above £2 billion (Ministry of Justice, 2010, p 5). The most significant savings in the legal aid budget, as Cookson suggested, would be made ‘by changing the scope of Legal Aid by removing many cases from coverage’ (Cookson, 2011, p 72), accounting for an estimated £280 million (gross) or around 80% of the savings. While criminal legal aid would (for the time being at least) remain available for those who ‘cannot afford to pay for their own representation’, civil legal aid was expected to be reduced considerably. In general, most areas of social welfare law were planned to be taken out of the scope of legal aid unless they were explicitly included as staying within scope. Specifically, the government planned to remove legal aid from employment advice (except in discrimination cases), from debt advice (except when someone’s home was at immediate risk), from welfare benefits advice, from immigration law (except in cases of detention), from divorce law and from school exclusion appeals as well as from clinical negligence and personal injury cases. The areas for which legal aid was expected to receive continued funding included family law cases that involved domestic violence and forced marriage or child abduction (Ministry of Justice, 2010). Apart from these changes in the scope of legal aid, the government also proposed to introduce a means-tested contribution in legal aid cases, resulting in those with assets of more than £1,000 having to pay at least £100 of their legal costs.
As a result of these proposed changes to legal aid, it was estimated that ‘605,000 people might be affected, of whom an estimated 595,000 might no longer receive Legal Aid as a result of removing specified law categories from scope and around 10,000 might now pay contributions or be subject to higher contributions’ (Ministry of Justice, 2011a, p 11). More recent figures have estimated an even higher number of 623,000 people losing out on advice on civil legal problems as a result of the reductions in the scope of legal aid (Hynes, 2012). Independent research (Cookson, 2011) suggested, however, that a reduction in legal aid spending in areas such as social welfare and family law as well as clinical negligence (£240 million, or 85% of the £280 million saving) might create considerable knock-on costs of £139 million, which might amount to 42% of the predicted savings, calling into question the government’s estimated savings from the legal aid budget.

While recent changes in the scope of legal aid had not fully crystallised at the time of this writing, in terms of their long-term consequences for Law Centres the effects of the Carter reforms, implemented in 2007, have become apparent. The following chapters (Chapter Three and Chapter Four) explore the challenges posed by these changes and the consequent dilemmas experienced by Law Centre workers and volunteers. Later chapters then go on to explore specific themes in further detail, including the views of other stakeholders in the face of increasing challenges for the longer term.

Notes

2 An umbrella organisation for independent advice networks in the UK consisting of 2,000 providers of advice, including Law Centres and Citizens Advice Bureaux (CAB).

3 See also news.bbc.co.uk/democracylive/hi/house_of_commons/newsid_9674000/9674331.stm (last accessed 4 March 2012). The legal aid budget of £2.146 billion for the year 2009/2010 was comprised of £1.205 billion for criminal legal aid and £0.941 billion for civil legal aid (Ministry of Justice, 2011a, p 9).

4 www.bbc.co.uk/news/uk-11741289 (last accessed 4 March 2012).
