

Sir Henry Brooke's address at the Annual Bar and Young Bar Conference 2017

This is the 32nd Bar Conference. The second Bar Conference took place 30 years ago. I was there. I had just finished a six-week stint co-ordinating the Bar's response to a Government consultation on legal aid. This time I have just finished nearly two years' membership of Lord Bach's Access to Justice Commission. We have been hearing what has happened to legal aid since 1987. It is not a happy story.

I will tell you how our work began. Before he went into politics Willy Bach had spent 25 years as a practising barrister on the Midland Circuit. He became the minister in charge of legal aid nine years ago. During his 18 months in office he got so concerned about the way decisions about legal aid were being forced on the department that he was determined, if he had the chance, to create a commission of experts, regardless of party political affiliation, to study the system from top to bottom and to make suggestions for its improvement. He knew that for nearly 70 years legal aid had been developed successfully on the basis of cross-party consensus. He wanted to restore that consensus. Justice is too precious to be used as a party-political football.

First, we had to ascertain the facts. We published our report six weeks ago. It is in two parts. The printed report contains our recommendations and a summary of our findings. But the evidence we received was of such a high quality that we were determined to publish it, too. This is why you have been given a link to the hundred written submissions, to summaries of all the oral submissions, and to three other papers which I hope will be as valuable as the report itself. These are my brief history of legal aid, the Fabian Society's summary of the costs and benefits of legal aid investment, and my detailed analysis of the evidence we received on most of the critical issues. Nobody could read that analysis without realising that things have gone seriously astray. One of the purposes of justice is to empower the disempowered. But justice is no longer accessible for many of the people who used to benefit from legal aid – for those who need justice most.

How did this happen? We learnt that since the turn of the century the Treasury has been treating the legal aid system in much the same way that Procrustes treated his guests. If total legal aid spend threatened to rise due to the incomprehensibility of new legislation, or the incompetence of the police or the CPS, or the ineptitude of staff employed by the Home Office or the DWP, it didn't in fact rise because steps were taken to reduce it. They reduced the number of people who qualified for it, or they narrowed its scope, or they tried to introduce price competitive tendering, where quality was always likely to yield second place to cheapness. And it was civil legal aid that was always the first casualty. The mess we were looking at was not just due to the LASPO Act. If you read my brief history of legal aid which forms Appendix 6 to the report, you will see that the rot set in long before LASPO passed into law.

Because of time constraints I will limit myself to three specific fields of law – family, housing and discrimination. In family law a quarter of a million fewer people are entitled to free legal help than was the case only five years ago. I am not talking about big money. Many of you charge out your services at £250 an hour or more. I am talking about help at a fixed fee of £86 for one

appointment, and then possibly an additional fixed fee of £208 for a bit more advice and assistance, including negotiation, and a further £125 if a settlement has to be drawn up. Without this help, warring couples who are not rich enough to pay for a lawyer often have no idea that the courts will put the interests of their children first, or that mediation may be far the best way of settling the way forward. Mothers are now denying fathers all contact with their children for fear, rightly or wrongly, that they will not be entitled to legal aid to help them if their father does not bring them back.

As we were ending our work, an unknown district judge wrote to me out of the blue. She described in detail how things were at the coalface, and she ended by telling me this: “Every day in the family court, with so many unrepresented litigants, is a long nightmare. So very many have mental health problems, drugs, language, learning difficulties. I can no longer do justice or protect the vulnerable child or adult. I am in despair.”

Nobody suggested that all the old arrangements should be restored, but there are certain matters which cry out for it, as senior Family Court judges never tire of saying. Legal aid is no longer available if the primary care of your child is in issue. Nor if there is an application to remove your child from the jurisdiction. Nor if you are being accused by your legally aided partner of sexual abuse to the children which simply did not happen. Nor if it is grandparents who have to apply for a care order. Nor if justice screams out for the help of a lawyer when a party simply cannot cope on their own. No wonder Mr Justice Bodey said on his retirement the other day that he had found it shaming to be presiding over such cases. The Government thought that exceptional case funding would be the shining knight in armour, galloping to the aid of these litigants. They said that it was likely that grants in private law family cases would be measured in their thousands. Last year fewer than 100 people received it in these cases.

In housing law nearly 100,000 fewer people are now entitled to early legal help than was the case five years ago. One of the most poignant moments of our inquiry came when a Grenfell Tower tenant told us that when they went to their local law centre for help with their landlords, they were told they could receive no help until someone was actually threatened with eviction, or until any disrepair was so bad it was seriously endangering someone’s health.

We repeatedly heard that it was a muddle over entitlement to housing benefit that brought people to the abyss of eviction proceedings, a muddle which could have been remedied far earlier if only a lawyer had been available to help. One study found that for an investment of £1,700 on a 16-year old girl who was about to be stigmatised as intentionally homeless, the exchequer probably saved £20,000 in the long run after she had been restored, with the help of her law centre, into a confident teenager capable of managing her own finances and eventually taking up a full-time college course.

Every newspaper we pick up tells us about the scale of the discrimination many people are facing today – for their gender, their ethnic origin, their disability or whatever. Legal aid was not taken

out of scope for discrimination cases, yet only a thousand people were helped by legal aid in such cases across the entire country last year. You have to use the telephone as the starting-point, and we received a bucketful of evidence that this has been a complete disaster. One law centre reported that the nature of a client's disability meant that she found it incredibly difficult to give informed instructions remotely, and she had to keep on going back to them again and again for more and more *pro bono* help with the telephone calls.

All these injustices – and there are many, many more – cannot of course be remedied straightway when we are in the middle of a budgetary crisis. Because the control of expenditure has been left to technicians, we estimated that instead of the anticipated annual savings of £450 million in money of today, the Government is now saving half a billion pounds more. We cannot retrieve that colossal underspend overnight, but we identified 25 priority areas for improvement when the money is there. Some of them are concerned with extending financial eligibility, some with enlarging the scope of legal aid, some with investment in public legal education and advice services, and some with the overhaul of clunky bureaucracy which costs us all nearly £100 million a year. And an important part of our recommendations, which some commentators did not understand, was that now that the office of a tough old-style Lord Chancellor is as dead as the dodo, Parliament must give teeth to a new Justice Commission, to see that justice, in all its emanations, can never again become a Treasury lickspittle.

Unless more and more people, lawyers and non-lawyers alike, are enabled to access our report, and to study the evidence that underpins it, it may be all too easy for Government spin-doctors to continue the charade that this is all about making fat cat lawyers even fatter, and that we are already spending enough. This, I think, is why Andrew Langdon put this item on your agenda today. Any lasting solution has to be a cross-party political solution. MPs of all parties are now seeing their constituency surgeries flooded with requests for legal help because there is perceived to be nowhere else to go. They all know there is little they can do to help. Many members of the Bar are being generous with their time and their money, with walking and running and cycling swimming and doing all sorts of other things to raise money for justice, but *pro bono* help will never be enough.

If we are to become proud of our justice system again, a comprehensive, evidence-based remedial strategy has to be found. Legal aid is far too important to be left to the tender mercies of the Treasury and the technicians and the high priests of PR. A political solution, built on consensus, is what is needed now, and I am pleased that the Bar is willing to play its part in the search for that consensus. I will be happy to do all I can to help.