

What shall we do without legal aid?

The Government's legal aid bill is currently going through Parliament. The intention is that most areas of family and civil law will be taken out of the scope of legal aid, as part of the Ministry of Justice's contribution to the cuts in public spending required by government.

Why does this matter, or, rather, why does it matter so much?

A great deal has been said on this subject recently, much of it by people much more eminent and eloquent than I, so rather than setting out my own thoughts on the subject I am going to shamelessly lift their words:

Supreme Court Justice Lady Brenda Hale:

'It is not enough simply to have a system of law. You have to have access to it when you need it... And it is hugely important that people believe that if they have a right they will have a remedy, that if they are done wrong, they will be able to get recompense; or conversely that if they have an obligation, they should honour it, or if they do wrong, they will have to pay for it. Businesses, large and small, cannot do without an effective system of debt enforcement. But neither can individuals, rich or poor, do without an effective system of protecting their rights. The fact that there is such a system benefits everyone, and not just those who have to use it, because it is part of what makes people respect one another's rights without having to go to court....'¹

Lord Chief Justice Igor Judge: '

It is one of the reasons why we are part of a society, that society should provide us with a place in which to resolve our disputes. The alternative is mayhem. The alternative is that if nobody else will help me I will have to find somebody who will help me throw bricks through the window or worse. So it's a cardinal requirement of a civilised society that facilities should be provided for the citizens to have their disputes considered and decided by an independent judge. I think there is a very serious problem with the way in which civil justice is developing. If you overlook the principle that in a sense a civil justice system is a requirement then you are overlooking something very important. You are in the end going to be producing a system that is hugely expensive. It doesn't help when you have a hugely expensive system because the truth is that unless somebody funds you or you are a very big corporation you are unlikely to be able to go to court. That's not acceptable.

.....I do believe that we have to provide a place in which citizens can go to court to seek a remedy for a wrong that have been done to them. They should not be priced out².

He was talking about court fees and the cost of litigation, but his remarks apply just as validly to other aspects of access to justice, including the availability of legal aid.

Or, as the late, great, Lord Bingham put it:

'All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future, and publicly administered in the courts'.³

¹ Henry Hodge memorial lecture at the Law Society 27 June 2011

² Law in Action Radio 4 27 October 09

But access to the courts is only half the story.....the story of those who know that they have a problem, and perhaps know that there is a legal remedy, but have limited opportunity to use the legal system to achieve justice.

The other part of the story concerns people who may not realise that their problem has a legal remedy, who have a whole tangle of issues affecting their lives which need to be unpicked to understand what solutions are possible - which may or may not be legal solutions. Very few people who receive legal advice proceed to litigate. This may be because they just want to understand their options, or do not have a good case, or their good case can be resolved by negotiation once they have a solicitor to advise or represent them, or, on occasion, it may be because they need help in preparing an application to a tribunal to challenge a decision by a public body.

As Lady Justice Hale has said:

'Cases which can have outcomes which the Government defines as serious, such as homelessness, domestic violence, loss of liberty, discrimination, human rights issues and abuse of power by the state, will remain in scope; while other kinds of housing case, debts, welfare benefits, employment, immigration, education, and most family breakdown will come out. But mediation in family disputes stays in.....'

In real life, as we all know and research has shown, clients come with a variety of interlocking problems. Family breakdown can easily lead people into debt, if debts are not tackled early and in the right way, they can easily lead to homelessness. People need the right advice and they need it early, before things have escalated into court. The idea that the law in some of these areas is simple and easy to understand is laughable.⁴

The government claims that the present system of civil and family legal aid and advice is unaffordable and that those who planned and instigated statutory legal aid never intended that it would grow in the way it has. Well, whether or not it is unaffordable there is plenty of evidence that the cuts will be even more so, in terms both of extra court time needed to deal with litigants in person and also in picking up the pieces of the problems that will be created by lack of timely legal aid and advice.

As for the assertion that the originators of the scheme never envisaged its current scope, that is simply wrong.

At the Conservative Party conference last year Michael Gove said:

'Children are growing up ignorant of one of the most inspiring stories I know – the history of our United Kingdom. Our history has moments of pride, and shame, but unless we fully understand the struggles of the past we will not properly value the liberties of the present'

So, a quick history lesson.

In the 500 years before 1950, access to justice for those who could not afford to pay was provided, to a gradually increasing extent, in a variety of ways; laws providing (very) limited assistance for (very) poor people in court; provision by charities, philanthropists, volunteers or local government for their communities or for those members of the public who could reach them; membership schemes such as those run by Trade Unions; special legal assistance for the armed forces; information centres such as Citizens Advice Bureaux; and, of course and

³ Lord Bingham *The rule of Law* p8

⁴ Henry Hodge lecture 27 June 11

throughout, free advice and representation provided on an ad hoc basis by solicitors and barristers.

The inadequacies of the availability of advice and assistance were well known for many years, but the Second World War, with the contribution of so many to the larger fight against tyranny and fascism abroad, finally created the political will to take drastic remedial action.

The Beveridge report of 1942 was commissioned by the war-time coalition government, and heralded the creation of the welfare state. As a part of planning for what was hoped would be a fairer future, the Liberal Lord Chancellor Viscount Simon appointed the Rushcliffe Committee in 1944, just before the D-Day landings: *"to enquire what facilities at present exist in England and Wales for giving legal advice and assistance to Poor Persons, and to make such recommendations as appear to be desirable for the purpose of securing that Poor Persons in need of legal advice may have such facilities at their disposal, and for modifying and improving, so far as seems expedient, the existing system whereby legal aid is available to Poor Persons in the conduct of litigation in which they are concerned, whether in civil or criminal courts."*

The committee reported in May 1945, the month the war ended in Europe but while it continued in the Far East. I give the context to show that the plans for genuine access to justice, commissioned by a coalition government including the Conservatives, were formed in desperately more difficult times than those in which the current Conservative-led coalition puts that access under threat.

The Committee described the existing ad hoc patchwork of legal aid, and said: *'there appears to be a consensus of opinion that the great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal assistance. . . . It follows that a service which was at best somewhat patchy has become totally inadequate and that this condition will become worse. If all members of the community are to secure the legal assistance they require, barristers and solicitors cannot be expected in future to provide that assistance to a considerable section as a voluntary service.'*

It recommended that: *'legal aid should be available in all courts and in such manner as will enable persons in need to have access to the professional help they require'* and that: *'this provision should not be limited to those who are normally classed as poor but should include a wider income group'*.

It also recommended that *'there should be facilities for legal advice) available all over the country'* for a fixed fee of half a crown (12.5p in decimal, and the equivalent of about £4.20 now), which would be remitted if the person seemed unable to pay even this. The scope of advice was to be: *'advice on legal matters, drafting of simple documents and negotiations apart from the conduct of litigation, but we do not include conveyancing or probate matters or the drafting of wills'*

Well, good for the Rushcliffe Committee you may think, but of course the authors of radical reports often have to suffer the bitter blow of seeing their vision trampled underfoot by the brutish politicians who have to justify all expense to the electorate, so we also need to look at the response of the government.

Labour won the 1945 election, and set about introducing the Welfare State contemplated by the Beveridge Report. After legislation creating new towns, nationalising coal, reforming education and welfare benefits and creating the NHS, not forgetting passing the Naval Forces (Enforcement of Maintenance Liabilities) Act 1947, the Civic Restaurants Act 1947 and the Judges' Pensions (India and Burma) Act 1948, they finally reached the Legal Aid and Advice Bill.

Marvellously, the Bill included almost all the recommendations of the Rushcliffe Committee, and even increased the financial eligibility limits that the Committee had proposed.

I have read the debate of the second reading of the bill in the House of Commons on 15 December 1948, and it is stirring stuff. It bears some similarity to the second reading of the current legal aid bill in the House of Lords on 21 November this year, in that both were long (about 7 hours in 1948 and 8 hours in 2011), and in both cases the contributions were unanimous: in 1948 unanimously in favour of the Bill and in 2011 unanimously against it.

In the 1948 debate the spokesman for the Conservative opposition confirmed that his party fully supported the bill, and he and other speakers made it clear that they hoped the scheme would expand in scope to cover tribunals and arbitration as time went on and as the capacity of the legal profession to take on the work increased.

These people were not starry-eyed idealists....they made it clear that they understood the desirability of avoiding litigation, the need to provide advice to help avoid litigation; and to have systems to prevent habitual litigants from exploiting the scheme and to filter out frivolous, vexatious, unreasonable or 'trumpery' cases.

Tom Driberg, the journalist, Labour MP and controversialist, approvingly quoted Hazlitt's comment that the only thing that gave him any respect for the House of Commons was the contempt felt there for lawyers, but went on to commend the bill, on the grounds that it was not a lawyers bill but a consumers bill: '*introduced...for the benefit of the vast mass of the people, working class and middle class*', or, at least: '*for that considerable minority of them who unfortunately 'get', as we always unkindly put it, 'into the hands of lawyers.'*'

Compare this generous goal, at a time when public debt was five times as a proportion of GDP was five times bigger than it is now,⁵ with the meagre and diminished vision of the current government that legal aid be limited to cases where: '*a person's life or liberty is at stake, where they are at risk of serious physical harm... where they face immediate loss of their home [or] in cases where children may be taken into care.*'⁶

What a come down.

In the event, the scheme when first introduced was quite limited. When the Act received the Royal assent on 30 July 1949: '*it was intended that every part of the service for which it provides; legal aid in civil courts, legal advice and preliminary legal aid and legal aid in criminal courts, should come into operation simultaneously, and appropriate administrative machinery was in an advanced state of preparation.*'⁷ Then devaluation led to plans having to be changed, and much of the scheme was mothballed until more prosperous times.

Cross party support for having a scheme with the scope originally intended by Rushcliffe continued long after the end of the wartime coalition. In 1951 Lord Jowett, Labour's Lord Chancellor, wrote: '*It was a source of great personal regret to me that the whole scheme could not be put into effect immediately, owing to the financial crisis, and that.... the provision of an*

⁵ Jonathan Freedland *The Guardian* 6 December 2011

⁶ *Hansard* 21 November 2011 Col 821

⁷ Sachs: *Legal Aid* 1951 p1

*overall system of legal advice for the first time in our historyhad to be postponed.....For me the planning of the new schemehas been a source of great pleasure, owing to the happy and fruitful association it has led to with the Law Society and the General Council of the Bar. Both the government and the two legal professions have worked together as a team with the one aim of making a Scheme of which the country may be proud.*⁸

The 1955 Conservative Party manifesto said:

'Justice between citizen and citizen, and justice between citizen and State must be upheld and strengthened.

The Conservative Party regretted that economic difficulties made it necessary for the Socialist Government to defer indefinitely the operation of important parts of the Legal Aid and Advice Act. We are now preparing to extend legal aid to proceedings in the County Courts, and also intend during the life of the next Parliament to introduce the comprehensive scheme for legal advice.'

However, despite these well intentioned words, the introduction of the comprehensive legal advice scheme took another 17 years.

The analysis of the Autumn Statement by George Osborne on 29 November this year suggests that we are heading for the longest period of falling living standards since records began. Currently the record for this dismal achievement is held by the 1970's.

If we go back to 1972 we find: a Conservative government, high inflation, high oil prices; a government pay and prices freeze (in those days governments thought that controlling prices was a legitimate option to be deployed if necessary), and two states of emergency in response to strikes by miners and dockers.

In this unpromising year the Legal Aid and Assistance Act, which finally realised the war-time ambition that ordinary people should be able to get advice and assistance on all matters of English law, was brought in by the Conservative Lord Chancellor, Lord Hailsham, no bleeding heart pushover, as I recall. When he was an MP he had spoken in support of the 1949 Act in the following trenchant terms:

*'I hope that no-one will ever come to think that by the introduction of schemes of this kind litigation can ever be made a good thing. It is, in its nature, an evil and a concession which we make to the follies and wickedness of mankind. It can never be anything else. It can never be other than something that we would wish to avoid, even though we make the courts open to rich and poor alike.....It is not only important to realise that litigation is an evil; it is also important to realise that neither speed, nor cheapness nor universality are the ultimate ends of litigation. The ultimate end is justice and the only foundation for a scheme of this kind, or of any scheme for the improvement of litigation, can be founded is the knowledge that justice, when it comes, will be the best and nearest approach to the truth and to the right assessment of liability that human wisdom and skill can give. Nothing short of that will give prestige or respect to a system of litigation or dispensation of justice in any country.'*⁹

Good for him in 1949, and good for him again in 1972, when he brought in the long-planned legal advice scheme.

⁸ Sachs: *Legal Aid* 1951 p vii.

⁹ *Hansard* Vol. 465 Col.1379

Ken Clarke describes the current legal aid scheme as 'huge and bloated'¹⁰. However, since the passing of the 1949 Act the cost of civil and family legal aid has gone up (allowing for inflation) by about 500%, whereas over a comparable period, the cost of the NHS has gone up by over 1,000%.

Of course it would be great if neither legal aid nor the NHS were necessary, but cutting availability doesn't make the need go away, in either case.

So.....what shall we to do without legal aid?

Firstly, what about the people who will no longer be able to get legal aid and advice from specialist lawyers?

Certainly there will still be advice available, from advice agencies and the volunteers and salaried staff who work in them, some of whom will be lawyers. The Citizens Advice Bureaux are a good example. But the Citizens Advice Bureaux themselves are under great financial pressure, and are unlikely to be able to deal with increased demand, and this applies even if many more people are willing to volunteer their time, as I explain later.

As for mediation....well, of course it is a good idea in principle, particularly when one contemplates the risks and horrors of litigation. Already mediation is used by very many people in a wide variety of circumstances, and this will continue and will grow.

But mediation is not a panacea, and will not be suitable to replace legal aid in many cases.

In the Lords debate it was pointed out that: *"the criteria for domestic violence are now so narrow that in many circumstances even if a perpetrator admits that he has raped a woman, his own admission no longer counts in getting his victim legal aid. This is madness. It is no good asking a woman who is beaten and raped by her partner to use what the minister described earlier as 'less adversarial means' to resolve disputes. Not only is it inappropriate to ask a woman to do this, it is adding insult to terrible injury."*¹¹

Those well known militants in the National Federation of Women's Institutes have written:

"Without access to legal aid, women will stay in abusive relationships: as a result, more women will be killed by violent partners and there will be an increase in suicides....

*Without access to legal aid, women will be forced to negotiate with the perpetrator, which will compromise their safety. The financial impact of paying for legal advice will deter women from seeking help*¹²

And if the case ends up in the family court, the unrepresented perpetrator of violence be able to - will have to - cross examine the unrepresented victim, and vice versa, a situation that is not allowed to occur in the criminal courts.

¹⁰ Interview with James Lewis for the IBA November 2011

¹¹ Baroness King of Bow. *Hansard* 21 November 2011 Column 872

¹² 'Legal aid is a lifeline' National Federation of Women's Institutes page 33

In cases where only one party can afford legal representation, and it will usually be the man, we will have the very unedifying spectacle of a woman who claims to be the victim of domestic violence being challenged by a skilled advocate, but having to cross examine her opponent, her ex-partner, her alleged, even her self-confessed, abuser, all on her own.

Possibly this will not just be a spectacle for the participants at court. The recent cautious opening up of the family courts to the press may result in the full horrors, and naked injustice, of these situations receiving wide publicity.

I wonder how long it will be before there is an outcry? I wonder how many of the tragedies and deaths forecast by the WI will occur before the government sees sense?

And even where there is no allegation of domestic violence, mediation is of limited value. By definition, both parties have to agree to the mediation, and legal advice in private family matters is both limited in time and entirely dependant on mediation taking place. So a woman who wants to understand what her options are, but who is still with her partner, will have no right even to legal advice under the scheme, and nor will a father who wants to have access to his children if their mother is not willing to attend mediation. Last week I was told of a young father who had his child at the weekends, who went round to pick the child up as usual, only to find that his ex-wife had moved hundreds of miles away, with the child, but without any discussion or notice of her intentions. This man is currently receiving legal aid, including initial advice and representation in court, as his ex-wife is unwilling to mediate. If the proposed cuts are brought in, he will be entitled to exactly nothing...no advice on what to do, no help with accessing the courts, certainly no representation in court.

Dealing with the consequences of marriage or relationship breakdown and the need to provide for children have been at the heart of civil legal aid since long before the 1949 Act, and when the scheme under the Act had to be limited in its introduction, matrimonial and family law was what was protected.

What on earth would those legislators make of the removal of legal aid and advice from this most commonplace of tragedies when so much is known not only about the damage relationship breakdown can do to children but also how the right help and support can mitigate that damage?

It makes government protestations about improving the life chances of disadvantaged children ring sound very hollow.

It is not just in some family cases that mediation will be an irrelevant alternative to legal advice and representation. The government is planning to cut legal aid for clinical negligence cases, much of which relate to babies and children who have suffered birth injury.

Mediation has no role to play in identifying causation of injury, and seems to have limited utility in deciding what the injured person's needs will be and so what compensation should be awarded. The government claims that these cases can be dealt with through no-win no-fee arrangements, but its proposed changes to that system, combined with the particular complexities and uncertainties of clinical negligence cases, make it unlikely that many of these complex birth injury cases will be taken on.

In 1951, Eric Sachs, a barrister and judge who had been closely involved in the development of the original legal aid scheme, wrote, in all seriousness, when discussing the limitations of the previous Poor Persons Procedure for cases in the High Court: *'The vast bulk of this work related to matrimonial disputes, for, in the nature of things those whose income was confined to some £2 per week, gross, were not often concerned with other forms of High Court litigation'*¹³.

This leads me to believe that the idea of a poor person suing a doctor or midwife for negligence resulting in the disability of their child was pretty much unimaginable at that time.

By contrast, the following scenario was described in the Lord's debate;

*'The reality for a parent who has given birth to a child who has suffered significant injuries as a consequence of medical negligence is very grim... They must learn to come to terms with the consequences of the alleged negligence in terms of their baby's ability to function... They must learn to do that which doctors and nurses normally do, to preserve the life and function that their children have. Often, they will be constantly exhausted and frightened.... In the midst of all this, and of all the consequential visits to doctors, occupational therapists and physiotherapists, as well as to those who provide wheelchairs and other aids and adaptations for those with disability, they must contemplate the need to commence legal proceedings to seek compensation, which will enable them to secure proper care for their children in the future... In the midst of all the grief, the confusion, the fear and the exhaustion, they will need to know how long they have to initiate legal proceedings... They will have to contemplate the costs of expert medical and other technical evidence to support and explain the situation to them. They will need the capacity to keep their claims going through years of litigation-and all this without legal support. Is this possible? All the while, in many negligence cases the costs of the defendant are borne by the public purse. We fund the defendant, but we will refuse to fund the complainant.'*¹⁴

So things have moved on.....people now understand that some tragedies are not acts of God, and that there are remedies, so long as they have not only the courage and determination, but also the energy, knowledge and skill to fight for their child, which most of them won't, or access to expert legal help, which they have now, but soon won't.

This is an awful prospect, which I do not believe society will accept. Medical negligence affects rich and poor alike, and litigation is beyond the purse of nearly everyone. Stoicism in the face of adversity and ill fortune is admirable, but the idea that families, or the public generally, will accept that disabled children's needs should be sacrificed in the interests of reducing the deficit is fanciful.

Even those newspapers which campaign against the so-called compensation culture are unlikely to accept this one.

Last month, Ken Clarke asserted that all cases where there was a sufficient public interest, and all cases of domestic violence and child abuse, would continue to receive legal aid funding, and that litigants in person: *'are not disadvantaged too severely*

¹³ Sachs :Legal Aid 1951 p5

¹⁴ Baroness O'Loan, Hansard 21 November 2011 Column 880

anyway. They are disadvantaged a bit by not having an advocate so the judge bends over backward to make sure he understands the case.'¹⁵

I think these claims may come back to haunt him.

Secondly, what shall the profession do without legal aid?

In last month's interview Ken Clarke, in typically robust fashion, characterised the profession's response to the cuts: *'what you have marching towards you is an army of lawyers advancing behind a line of women and children, saying of course they are not concerned about the income of the profession, but their only concern is for these vulnerable clients who will be adversely affected if they're if they are not paid the rate they currently are'*¹⁶.

He went on to imply that he knew what he was talking about because he is a barrister.

Mr Clarke, is, of course, entitled to his opinion, but he must know that there is only so far a barrister is allowed to go in selecting from the evidence. Perhaps he was really speaking as a politician, where there is more scope for creativity and flexibility, so that the need for dramatic effect was allowed to oust the fact that the proposed cuts are not to do with rates of pay (we have recently accepted a 10% cut in rates across the board), but with the cutting of whole areas of law from the scope of legal aid.

I was very cheered to see, in this interview, that he also made a disparaging comment about the Law Society's campaign against the cuts (go to www.SoundOffForJustice.org and support the campaign), which suggests that we have been annoyingly successful in raising public awareness of the cuts and mobilising public opinion about the effects they will have on people on ordinary incomes.

He took a final swipe at the profession of which I think he claims to be proud to be a member, when he said: *'We have arguments about the definition of domestic abuse but that is because of people trying to broaden the scope of what we are doing because there is more money in it..... What I'm trying to do is identify the genuinely vulnerable...not the vulnerable law practices'*.¹⁷

It is not clear here whether he is talking about solicitors or the Bar. Of course I can't speak for the Bar, save to say that I know many barristers about whom his remarks are mere calumny, but I am on firmer ground when speaking about legal aid solicitors, because I have been one since I qualified, I own a firm which still does mainly legal aid work, for many years I have been involved with access to justice and legal aid issues at the Law Society, with the Legal Action Group, and the Legal Aid Practitioners Group, and since becoming an office holder at the Law Society I have been able to meet with legal aid and ex-legal aid lawyers all over the country.

And I don't believe for a moment that the campaign against the cuts is merely, or even mainly, self-interested.

I know that most legal aid solicitors are willing to continue doing this work as long as they are allowed to do so, not for the money (because that would be perverse), but because of their commitment to their clients and their communities.

¹⁵ Interview with James Lewis for the IBA November 2011

¹⁶ Ibid

¹⁷ Ibid

I also know that many firms have given up legal aid, not because their commitment to their clients and communities has lessened, but because they could not afford to keep doing the work.

And when I talk to the solicitors from those firms who used to do legal aid, they tell me that although they really regretted having to give it up, it was the best thing that could have happened and they couldn't imagine going back to legal aid: to the strain, the bureaucracy, the exhaustion, and the lack of respect from government and the press. Their belief in the importance of the work, the appreciation of their clients, and their dogged determination kept them going until it was impossible to go on, but now that they had stopped, and found other sources of reasonably paid work for appreciative clients, there was no way they would return to legal aid.

I reckon that's what will happen to most of the solicitors who have to leave legal aid; it will be a wrench, and there will be pain as we adjust to new work, and some people will become casualties (who the Law Society will do their best to help), and others will retire with relief. But most of us will survive, as we are clearly a particularly hardy, optimistic, resilient and creative bunch to have lasted this long in such difficult circumstances.

One thing that we know legal aid lawyers do very well is providing good quality advice and representation at low cost: we've been doing it for years. What seems very likely is that many will find ways of packaging their services so as to tap into the unmet needs of those who are not currently eligible for legal aid but are nervous of seeking help from solicitors because of a fear of the cost. The example of well-known and highly respected family legal aid lawyers working to set up such a service with the Co-Op is a pointer to how services will develop, which will be good for the solicitors and good for their new client group. I know of a number of other innovative schemes being set up with the same idea, which is all to the good.

We will also find ways of reaching people with intractable and serious problems who do not even realise that there may be a remedy for the problem, and that it would be worth paying a solicitor for help.

However, these new schemes will not be of much help to those who can't afford to pay even modest amounts for advice, and to all those who cannot risk litigating for fear of adverse costs orders.

It seems that the government believes that pro bono solicitors and non-lawyer volunteers will step in to fill the breach. This seems highly unlikely. Volunteers, for instance in the Citizens Advice Bureaux, do a great job, but they, and their supervisors, know their limits and would not wish to go beyond them. They very much rely on legal aid solicitors to be able to make referrals, and as they are also having funding cut, they face a double whammy which does not suggest an expanded service.

Legal advice has to be accurate if it is to be of any value, and so when legal advice is provided by unqualified or inexperienced volunteers it has to be closely supervised by experienced lawyers who are paid and will continue to be paid, so an increase in volunteers will require an increase in salaried staff, for which there is no money. An aspect of the supervision and training is intended to ensure that when someone seeking help has a complex problem, or problems, beyond the ability of the advice

service to help with, this is recognised and the person is referred to an expert, who is likely to be a legal aid solicitor.

But soon, in whole swathes of law, there will be no legal aid solicitors to take on referrals, and in some areas, such as welfare benefits, no solicitors at all, as there will be no privately paid work in these areas.

As for expanding the provision of pro bono services by City and commercial firms, there doesn't seem much scope here. Our regulator is very clear that we must only do work within our competence, and undertaking social welfare law is not within the competence of most of these firms. The contribution they make by volunteering in law centres and advice centres is done under specialist supervision. No supervisors means no pro bono volunteering in this way.

Of course firms working in and for their local communities will continue to undertake pro bono work, as they have always done. Giving free advice and even taking on cases without payment is an integral part of our ethos, maintained in good times and bad. However, expansion seems unlikely when times are so hard.

Currently I know of solicitors in private practice and in law centres who are thinking up new ways to provide a free service for those who need it. Alternative business structures have come along just in time to let us develop projects that will be able to obtain charitable funding and tax rebates, which will support a modicum of free legal advice.

However none of this is going to be enough to close the gap in access to justice, which needs to be remedied if the rule of law is to be upheld.

Upholding the rule of law is part of the profession's DNA, and is a fundamental part of the training and practice of every solicitor.

This is reflected in the first three regulatory objectives of the Legal Services Act 2007: *'protecting and promoting the public interest; supporting the constitutional principle of the rule of law; and improving access to justice'*¹⁸ and in the first of the regulatory principles in the profession's code of conduct: *to uphold the rule of law and the proper administration of justice'*¹⁹.

Politically, the solicitors' profession is as broad-based as the general population, probably a bit more conservative than the average, so, as a representative body the Law Society does not involve itself in party politics. However, our professional, regulatory and legal duty to support and uphold the rule of law requires us to act when it is under threat, and the Law Society has a role to play no hesitation in helping its members to do their duty.

We know, as does the government, that laws are made to be used, and lawyers are there to make sure they are. We also know, and assume the government does, that if laws intended to promote social justice, human dignity and equality of opportunity are not available to those who need them most, the actual consequence of those laws is to increase injustice, indignity and inequality.

¹⁸ S.1 Legal Services Act 2007

¹⁹ SRA Code of Conduct 2011

For example, in the Lords debate a peer commented: *"The government's own research shows that many disabled people find the support provided by disability living allowance vital in ensuring that they can stay in employment and close to the labour market. Without legal aid to allow disabled people to challenge incorrect decisions effectively, it is inevitable that more disabled people will find themselves further from the workplace, receiving incorrect benefit awards or lacking support to find employment, and therefore the government's intention to get more disabled people into employment will be undermined."*²⁰

This is one of the very curious things about government attitudes to civil legal aid; access to justice helps deliver the ambitions of government by ensuring laws to help and protect individuals can be used by those very individuals; you would think that they would be asking us to do more of this stuff rather than cutting it.

It is inconceivable that the government would deliberately or recklessly undermine the rule of law, and Ken Clarke has confirmed that the proposed cuts are not intended or expected to do this: *'This presentation of what we're doing somehow depriving people of access to justice is I'm afraid one I rather strongly reject'*²¹.

So we expect the government will applaud our efforts, and give us moral, if not practical, support to our plans to support and promote access to justice.

We have been giving a lot of thought to what could be done if the cuts go ahead, to help secure the access to justice that government claims to cherish.

One of the major downsides of the current legal aid system is that it is very difficult to litigate strategically. We all, including the government, know that many cases in civil legal aid arise from poor decision-making by public bodies. This problem is almost certainly going to get worse, as public bodies will be shedding staff and using cheaper (i.e less experienced) staff when they can. These people will probably be less well trained, less well supervised and more and more busy as others leave, so they will make more mistakes, more of which will not be picked up by supervisors.

To respond to this we will be inviting, and have already started talking to, some of our members with deep pockets and a commitment to pro bono social welfare law. The plan is that they will use their resources to take strategic cases against public bodies, including the government if necessary. Challenges will be wide-ranging and will include challenges to unacceptable performance as well as to policies or laws that breach existing domestic commitments and obligations under international treaties.

Another issue with the current system is that when you win a legal aid case against a public body, the court is often reluctant to award costs, as it is just moving money from one public budget to another. However when more pro bono cases are taken against public bodies the situation will be quite different.

Judges are allowed to make a pro bono costs order when a litigant in receipt of free representation wins her case. The money goes to the Access to Justice Foundation,

²⁰ Baroness Doocey *Hansard*, 21 November 2011 Column 921

²¹ Interview with James Lewis for IBA November 2011

which is a national charity that provides grant funding to support pro bono and advice agencies that give free legal help to the public in need.

We will be encouraging the use of these orders when public bodies have been found to be in breach of their obligations, and will also encourage the judiciary to make Protective Costs Orders, which protect the participant granted the order from the risk of having to pay any or all of the opponents costs if they lose.

PCO's can be made when the court is satisfied that; the issues raised are of general public importance; the public interest requires that those issues should be resolved; and the applicant has no private interest in the outcome of the case. We expect many of the pro bono strategic cases will meet these criteria.

If judges accept the importance of these cases in upholding the rule of law, and the importance of these costs orders in doing likewise, we will achieve a virtuous spiral where winning a case not only improves services but also provides funds to support the provision of free legal advice to those who need it.

City and commercial firms with formal pro bono programmes have always been very careful not to take on work that could be done under legal aid or that a client could afford to pay a high street firm to do. This is as it should be, and will continue to be the case, but the proposed cuts require a re-think of how all parts of the profession can work together most effectively to mitigate the effects of the cuts.

The broad and deep knowledge of those delivering social welfare and family legal aid and advice, whether in private practice or in the not for profit sector, will be an essential ingredient in identifying the issues and providing the evidence necessary to take strategic cases, thus bringing different parts of the profession together in their support of the rule of law.

We are concerned at the growing evidence that people with disabilities are not getting the resources that the government has decided they are entitled to. We are therefore piloting a scheme to improve decision-making in this area, both by the DWP and by tribunals dealing with appeals against the refusal of benefit. We hope that this will have mass participation in due course.

We will also, of course, signpost those with legal problems, who cannot afford a lawyer, to their MP.

We will hold government to account on its promises. For instance, the legal aid minister, Jonathan Djanogly, in evidence to the Public Administration Select Committee on 22 November, made a personal commitment to be the champion of individuals using the tribunal service after the abolition of the Administrative Justice and Tribunals Council that currently has this task.²²

Well, we shall be watching very closely, and will be referring relevant matters to him.

We have various other ideas which it is a little too early to discuss, but our ambition is to make the Big Rule of Law Society an essential part of our public service.

²² HC 1621-i Answer to Q111

And finally, what shall the politicians in power, the government, do without legal aid?

They have promised that the loss of legal aid will not mean a reduction in access to justice. This is a bit odd, as their own impact assessment talks of the adverse impact of the cuts on a number of vulnerable groups of people in society. However, it is certainly the case that the effects of the cuts could be ameliorated by government action.

For instance, if they improved decision making by public bodies, simplified court procedures, required more case management from judges, provided more support for marginalised people and did much more to get people into work, that would make a big difference.

They would be well advised to have a contingency plan and be aware that as and when they decide to bring advice and representation back in, they will need to attract a new cohort of lawyers to provide the service, because the ones who have left will not come back.

In fact, there are lots of practical and sensible things they could do....but I'm not holding my breath.

In the alternative, I have two short pieces of specific advice:

- 1) Think again;
- 2) Make provision in the Bill to bring work back into scope, because you are going to need it.

LSM 7 December 2011