

## CAN WE AFFORD ACCESS TO JUSTICE?

If people cannot enforce their rights then they do not have rights - if only the prosperous can enforce their rights, we do not have a system of justice but one of injustice.

This is not just a moral issue, but an economic one. The Legal Services Commission believes that about a million legal problems are not dealt with each year, and these problems are very likely to be of the sort that will make a real difference to people's lives and their prospects of being happy and useful members of society. If people have no access to justice, not only is their problem not solved, but it is also likely that the person's sense of being a valued member, or a member at all, of our society will be eroded. The not-so merry-go-round of family breakdown, poor housing, stress, problems at school, ill-health, depression, drink or drug abuse, debt, and crime is not only a cause of great individual misery but also a great financial and emotional burden on our society that we should be doing everything we can to reduce, in all our interests. And although the law is usually not the best way to start trying to solve these problems (as the government has recognised with the Sure Start programme for instance), it needs to be there as a last resort.

If you accept that proper access to justice benefits not only the individual obtaining justice, but also the society that provides it, it follows that we

can't afford not to have access to justice and the question then turns from whether we can afford access to justice to how best we can provide it.

Litigation, and lawyers, are expensive, even when the lawyers are working at legal aid rates (of which more later). However the thing to realise about the areas of law covered by legal aid is that by the time a lawyer becomes involved, something has already gone wrong and, directly or indirectly, the public services are very often implicated in this. For instance Housing, Immigration, and Welfare Benefits accounted for nearly a quarter of a million new cases started in 2004/2005 (66% of all non-family civil cases started) and the public services are likely to have been directly implicated in many of them, in that the case was probably brought on the ground that a public service has failed to carry out its duty in some way. A further 4% of the annual total cover actions against the Police, Clinical Negligence, Community Care, Education and Public Law, and in all virtually all of these cases a public service will be directly implicated. Allegations against public services will also feature in some of the remaining 30%, which include Consumer, Debt, Employment, Mental Health and Personal Injury, so it is reasonable to conclude that in 70% of non-family civil cases public money is being spent on lawyers and litigation to put right problems arising from bad central or local government decision making.

It is unrealistic to expect public services never to make mistakes and it seems very likely that the cases that end up with lawyers are probably just the tip of the iceberg. Indeed if public services are implicated in 70% of the million unresolved problems identified by the LSC as well, this means that the public services are the cause of 1m problems a year, only a quarter of which are then resolved through legal aid.

That's a lot of unhappy and frustrated people with a sense of grievance, and it seems pretty obvious that the best sort of access to justice would be for these matters to have been decided properly in the first place, For instance, one of the solicitors in my firm, Mitchell Woolf specialises in representing locked-up and looked after children and young people with complex social, psychological and emotional problems . Recently he represented a 15 year old, with psychiatric problems and a history of domestic abuse and alcohol and drug use, who was released from a Secure Training Centre with no home to go to ..... he wasn't in contact with his father and his mother said he couldn't live with her. Although he had been known to his local social services since he was very young, and was clearly a "child in need" under the Children Act 1989, and therefore entitled to holistic services to meet his social, educational and health care needs, his responsible social services department purported to meet its statutory obligations by arranging for the boy's social worker to meet him

every day and give him £5.

Another client, now aged 18, had been given an ASBO after achieving notoriety as a one-person crime wave in his neighbourhood; he had been used by family members and others to beg and steal to support their drug habits. As a condition of the ASBO he moved away, and, with much help from others and enormous effort on his part, he turned his life around, getting enough exams to be able to start a vocational course at college. However when he turned 18 the local authority decided that he would have to return to his home area, as funding his care in the new area was too expensive. All those working with this young man believe that a return to his home area would put at risk all he has achieved, and he himself was terrified that if he returned he would be sucked back into an anti-social lifestyle as the only people he would know would be those who had set him on the wrong path when he was a boy. Clearly, the local authority was in breach of the Children (Leaving Care) Act 2000, which required it to make plans to meet him immediate and long term social, educational and health care needs, as well as taking his view into consideration and providing him with support.

Most young people in a similar situation won't find someone like Mitch, and they will probably end up in more trouble. With luck, they will then find a legal aid solicitor who will be able to deflect the worst consequences, but how much better it would be, for all of us, if cases like

this were dealt with properly in the first place without the need for lawyers. These sorts of cases, and so many other cases against public bodies, are examples of extreme institutional selfishness, where decisions are made in the financial interests of an organisation regardless of the huge burden that will be placed on other public bodies and society at large, let alone the wretched victim of the unlawful decision.

The NHS is recognising that acknowledging fault and trying to solve the problems arising from them, is a much better use of public money than defending itself in court, and a way should be found to impose the same discipline on government departments, local authorities and other public bodies.

I suggest, therefore that the National Audit Office, or some other suitable organisation, be invited to develop an audit system that includes an audit of decision-making and of any perverse incentives there may be to encourage poor decision-making. This should result in increased access to justice not only for those people who are eligible for legal aid, but also for those who cannot afford a solicitor or do not know how to go about contacting one.

And I'm not just talking about the poor and socially excluded here.

The income cut-off point for legal aid is £27,456 per annum. A special needs teacher in Inner London will earn this 3 years after qualifying, and a

staff nurse working unsocial hours in an NHS hospital in Inner London will do so as soon as she qualifies, as will a Metropolitan police officer after 18 weeks basic training. What's more, the £27.5k cut-off relates to the income of a family, not just an individual, so a family with 2 children, where one parent earns £16,000 and the other £10,000 will be ineligible for legal aid, as child benefit will take them over the limit.

Legal aid was introduced in 1949 as one of the three primary rights of a just society ..... the right to health, the right to education and the right to justice. Lord Falconer, in his forward to the DCA's response to the fundamental legal aid review that has been taking place, says that the legal aid system is one of the proudest legacies of the progressive post war Labour governments, but it is clear that the right to justice has not kept its place with the other two; ..... after all, we wouldn't think much of the NHS if it were only available to people with an family income of less than £27.5k, and the right to education would have a pretty hollow ring if the state system were unavailable to those earning more than this.

So, if the special needs teacher mentioned above has a child with special needs and the education authority isn't meeting those needs, and the complaints system is no help, this essential public servant will have to pay privately to challenge the authority's failure to make proper provision.

A well known and well respected education and disability lawyer told me that the cost of such a case is likely to be between £4,000 (for the most straightforward case with a solicitor charging £150 per hour and one expert's report for £400) and about £11,000 for a complex case (with 2 expert's reports at £1,000 each and a solicitor charging £300 per hour), which is going to be unaffordable for someone who will still be paying off their student debt as well as paying for life in the city. So, no access to justice for this child or her parents.

The same solicitor also told me that he is convinced that some education authorities deliberately fail to provide adequate special needs provision, in the knowledge that most people won't challenge their decision, and that, of those that do, most won't succeed because they will not be eligible for legal aid and they will not be able to pay privately for legal representation, and that it is cheaper to pay a lot for the occasional case that goes all the way than to make proper provision for all who need it. Cheaper for them, maybe, but more expensive for the rest of us who have to pick up the financial and emotional tab for the problems that the child and his family are more likely to experience.

A charitable explanation for the way in which the right to justice has been downgraded as compared to the right to health and the right to education, is that the latter are provided by salaried services, whereas

legal aid is provided by private businesses, who have been perceived as not very worthy recipients of public money. But this can't really be right, because the Government has a very different attitude to some lawyers who provide publicly funded services. For instance, under the Freedom of Information Act I obtained a copy of the contract between an NHS trust and the firm that provides it with legal services. The contract is 10 years old, and shows that the rates charged by the firm then were about 3 times the rates paid under legal aid now for similar work ..... My own theory, which is not very charitable, to explain the way the right to justice has been eroded is that, at quite a deep level, legal aid lawyers annoy the state, because so much of what they do involves challenging the state, as evidenced by the official statistics given above.

The education lawyer also told me that the amount allowed to his firm by the Legal Services Commission to cover the costs of a case, where the privately paying client would pay between £8k and 11k, is about £,1100, out of which VAT and the cost of the expert's reports would have to be paid as well.

Which brings me to my last point.

Increasingly, when asking themselves the question of whether we they can afford to provide access to justice under the legal aid scheme, lawyers are saying "no".

Rates of pay have not kept pace with inflation; in my own speciality of mental health there has been a single increase of 5% in 5 years, during which time the RPI has gone up 14% ..... and this is exacerbated by the fact that the money we get has to pay for our overheads as well providing our income, and of course those overheads have also gone up by 14%, so it's a double whammy.

I'm not trying to make you feel sorry for the financial woes of lawyers, who can generally look after themselves ..... and that's what they are doing; ..... many of those who can get out are getting out, and many of those who might have come into legal aid are not doing so. And as you can't import Australian or Malawian or Polish lawyers to fill the gaps, as you can in the NHS or the school system, the government has a real problem.

And it is also very unlikely to be able to solve the problem within existing budgets by setting up a salaried service.

In 2001 the Legal Services Commission set up a salaried criminal defence service, known as the Public Defender Service, which now has 8 offices, and, by the accounts given in its annual reports, appears to provide a good service to its clients and good working conditions for its staff. But this comes at a cost ..... I have compared the information provided by the Public Defender Service in its annual reports with similar information provided by an analysis of the records of a criminal defence firm in North

London, which suggests that the North London firm, on average, does each case more than 20% cheaper than the PDS, but that the lawyers have to work about 50% more hours to earn 70% of their PDS counterparts. If private practice gives up, therefore, and is replaced by a salaried service, it will cost the government vastly more than it is paying at the moment to provide the same level of service.

As I said at the beginning, access to justice is economically desirable as well as socially necessary and morally right. At the moment, a very large number of people have no real access to justice, and therefore no effective way of holding public services to account. All legal aid lawyers hope that Lord Carter's current review of legal aid procurement will find a solution, but if it doesn't or if the government doesn't implement any solution he does come up with, the decision to abandon the right to justice will be a part of this government's legacy that history is likely neither to forget nor to forgive.

**Ism 24 sept**