

The LASPO Review: My Recent Talk About the Bach Commission's Report on the Right to Justice

SIR HENRY BROOKE
with an introduction by
SIR TERENCE ETHELTON*

Introduction

The publication in this issue of the Birkbeck Law Review of two speeches made by the late Sir Henry Brooke relating to legal aid and the government's review of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act is well timed. The editors of the Review and I are extremely grateful to the family of Sir Henry for permission to publish the speeches. They will acquaint or re-acquaint the readers with a remarkable man, who passed away in January 2018 after a long and fulfilled lifetime working tirelessly for justice and equality. He was called the Bar in 1963 and, having started with work in the magistrates' courts, the county courts and the coroners' court, established a successful wide-ranging practice, which included stints as counsel to the inquiry into the Sizewell B nuclear reactor plant and as a trade inspector reviewing Mr al-Fayed's takeover of Harrods. He was, even then, a firm advocate for racial equality, chairing the Bar's race relations committee. Having become a QC in 1981 and a recorder in 1983, he was appointed a high court judge in 1988. He chaired the Law Commission of England and Wales from 1993–1995 before being promoted to the Court of Appeal in 1996. He was a lord justice for 10 years, eventually becoming vice-president of the civil division of the Court of Appeal. He became the first chair of the ethnic minority advisory board of the then Judicial Studies Board. His work on improving access to justice led him to become president of the Slynn Foundation and subsequently vice-chair of Lord Bach's Access to Justice Commission. He drafted many of the key sections of the Commission's final report. He was the first chairman of, and a great pioneer in establishing BAILII, the now indispensable digital source of

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British and Irish case law. He was passionate about using technology to make the courts more accessible and transparent. It is no surprise, therefore, that in recent years he became a renowned legal blogger and user of Twitter. He used those platforms to great effect in championing access to justice and speaking with authority and without fear on topics that he cared greatly about, as well as demystifying the legal world. In 2017 he was presented by the Albanian government with the highest honour for a non-citizen, Knight of the Order of Skanderberg, for his contributions to reform of the Albanian justice system. On the announcement of his death, a human rights lawyer wrote: 'His loss is immeasurable but his legacy is huge—a truly great man'.

Sir Terence Etherton
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Sir Henry Brooke, with an introduction by Sir Terence Etherton

The LASPO Review: My recent talk about the Bach Commission's report on the Right to Justice

Now that the government has announced its review of the LASPO Act, and has published what it calls a Post-Legislative Memorandum, I am starting a new series of blogs which will give my insights into the way the review is developing, and I will draw attention to important documents in the public domain.

I will start with the text of the address I gave at the start of a two-hour event in Parliament two days ago. Although the purpose of the event was to give Parliamentarians a chance to listen to the experts on the Bach Commission and to ask about our findings, the fact that the event was organised by the Fabian Society seems to have frightened off any Conservative MPs or peers who might otherwise have been interested. This was a pity.

Despite this, there was a fairly full Committee room, and plenty to talk about.

My address in Committee Room 9 in the Houses of Parliament on 1st November 2017

Our report¹ was published six weeks ago. It should be required reading for anyone who is concerned with responding to the government's new review of the LASPO Act.

I have been asked to tell you a bit about the Commission and its aims, and I will also summarise our main recommendations. There will then be plenty of time for comments and questions. I believe very strongly that if enough people study the report carefully—and also take the trouble to read a few of the papers we have published with it—it could mark a turning-point of the same importance as the original Legal Aid and Advice Act in 1949.

When we first met, Willy Bach told us that he thought that both major parties had made mistakes when they were in government. It

¹ The Bach Commission, 'Fabian Policy Report: The Right to Justice. The final report of the Bach Commission' (Bach Commission, September 2017) <http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf> accessed 11 August 2018.

was against this background that he wanted us to produce a very thorough, evidence-based report describing in detail how things stood today and what we thought ought to be done to put the show back on the road again, ideally with cross-party support.

Although the Labour Party sponsored this report, we were selected for our independence and expertise, and I would have behaved in the same way, within reason, whoever had asked me to do this job. Somebody had to do it. My great hope is that somehow or other we can eventually return to an all-party consensus about legal aid. Justice is too precious to be a party-political football—although I realise that this may be too much to hope for, at any rate in the short term.

We started with seven sessions of oral evidence—from the Law Society,² from the Bar Council,³ from Lord Low and Steve Hynes on behalf of the Low Commission,⁴ from two technology experts Richard Susskind⁵ and Roger Smith,⁶ from the Society of Labour Lawyers,⁷ and

² Sir Henry Brooke, 'The new Access to Justice Commission: Update 6 (The Law Society)' (sirhenrybrooke.me, April 2016) <<https://sirhenrybrooke.me/2016/04/02/the-new-access-to-justice-commission-update-6-the-law-society/>> accessed 11 August 2018.

³ Sir Henry Brooke, 'The new Access to Justice Commission: Update 7 (The Bar Council)' (sirhenrybrooke.me, April 2016) <<https://sirhenrybrooke.me/2016/04/11/the-new-access-to-justice-commission-update-6-the-bar-council/>> accessed 11 August 2018.

⁴ Sir Henry Brooke, 'The new Access to Justice Commission: Update 3 [revised] (Lord Low & Steve Hynes' evidence)' (sirhenrybrooke.me, March 2016) <<https://sirhenrybrooke.me/2016/03/28/the-access-to-justice-commission-update-3-lord-lows-evidence/>> accessed 11 August 2018.

⁵ Sir Henry Brooke, 'The new Access to Justice Commission: Update 4 (Professor Susskind)' (sirhenrybrooke.me, March 2016) <<https://sirhenrybrooke.me/2016/03/29/the-new-access-to-justice-commission-update-4-professor-susskind/>> accessed 11 August 2018.

⁶ Sir Henry Brooke, 'The new Access to Justice Commission: Update 5 (Roger Smith)' (sirhenrybrooke.me, March 2016) <<https://sirhenrybrooke.me/2016/03/31/the-new-access-to-justice-commission-update-5-roger-smith/>> accessed 11 August 2018.

⁷ Sir Henry Brooke, 'The new Access to Justice Commission: Update 8 (The Society of Labour Lawyers)' (sirhenrybrooke.me, March 2016) <<https://sirhenrybrooke.me/2016/04/12/the-new-access-to-justice-commission-update-8-the-society-of-labour-lawyers/>> accessed 11 August 2018

from the two leading groups of solicitors practising criminal law.⁸ I have set out the gist of all this evidence in Appendix One to the Report.⁹

Then we asked for written evidence, and we received a torrent of very high quality material.¹⁰ I spent a lot of time last year making this more accessible to Commissioners and the Fabian Society, and this is what the next two Appendices are all about.¹¹ We published our Interim Report a year ago.

We had four more all-day hearings this year. One to tease out some of the issues that form Part One of the Final Report, two on different specialist aspects of the legal aid scene, and the last one on public legal education and advice services. Appendix Four¹² gives the gist of this evidence.

And we then spent three months accelerating towards the finish. The Fabians did a wonderful job putting our thoughts together in intelligible English.

As you will know, the Report falls into two parts. In the first we say that in the light of what has happened in the last 20 years, justice needs better protection, and we propose a new Right to Justice Act.

⁸ Sir Henry Brooke, 'The new Access to Justice Commission: Update 9 (The CLSA and the LCCSA)' (sirhenrybrooke.me, March 2016) <<https://sirhenrybrooke.me/2016/04/14/the-new-access-to-justice-commission-update-9-the-clsa-and-the-lccsa/>> accessed 11 August 2018

⁹ The Bach Commission/Sir Henry Brooke, 'Bach Commission on Access to Justice—Appendix 1—Oral Evidence: First Session' (<https://www.fabians.org.uk>, September 2017) <<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-1-F.pdf>> accessed 11 August 2018

¹⁰ <http://www.fabians.org.uk/right-to-justice-the-appendices/>

¹¹ The Bach Commission/Sir Henry Brooke, 'Bach Commission on Access to Justice—Appendix 2—The Current State of Access to Justice' (<https://www.fabians.org.uk>, September 2017) <<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-2-F.pdf>> accessed 11 August 2018 and The Bach Commission/Sir Henry Brooke, 'Bach Commission on Access to Justice—Appendix 3—Transforming Our Justice System' (<https://www.fabians.org.uk>, September 2017) <https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach_Commission_Appendix_3_F.pdf> accessed 11 August 2018

¹² The Bach Commission/Sir Henry Brooke, 'Bach Commission on Access to Justice—Appendix 4—Oral Evidence: Second Session' (<https://www.fabians.org.uk>, September 2017) <<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-4-F-1.pdf>> accessed 11 August 2018

This will create an enforceable entitlement to justice, within reason, at an affordable cost. We also propose a new Justice Commission, ideally headed by a senior judicial figure, to make sure that the new Act isn't simply a dead letter. This is very high-level thinking, and there will be a lot of work needed to tease out the detail. When David Pannick rubbished this recommendation while praising the rest of our work, he cannot have had time to read the report properly. This is not just about access to the courts which are at the top of a pyramid. Most people never go near a court, and for millions of people a right of access to basic information about our legal system and the places where they can get basic legal help is the compelling need.

In Part Two we put forward a 25-point plan in which we identify what we think should be the priority areas for reform, if the money is there. I will mention some of them in a moment, but they include an overhaul of the rules for financial eligibility, turning the Legal Aid Agency back into an independent statutory body, restoring a lot of the provision for early legal help which was axed four years ago, proper support for public legal education and advice services, and very few areas where we think the right to publicly funded legal representation in court should be restored. The development of online information is of critical importance, but so is face-to-face advice for those who need it.

Appendix Five¹³ contains my analysis of some of the detailed evidence on key issues. This is a "must-read" for anyone involved in the current debate about legal aid. It makes very painful reading. I have published 18 excerpts on my blogsite to give people a feel of what is there.

¹³ The Bach Commission/Sir Henry Brooke, 'Bach Commission on Access to Justice—Appendix 5—An Analysis of the Evidence' (<https://www.fabians.org.uk>, September 2017) <<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-5-FINAL-1.pdf>> accessed 11 August 2018

Appendix Six¹⁴ contains a brief history of the first 70 years of Legal Aid which I wrote last year, and Appendix Seven¹⁵ is a paper by the Fabians on the cost implications of our proposals and the savings they can be expected to achieve.

This paper tells us that in today's prices LASPO was originally budgeted to make annual savings between £400 and £450 million, and that in fact they have made savings of about £950 million—a £0.5 billion annual underspend. In last Monday's Government memorandum this figure is accepted and its breakdown is shown on page 52. The Fabians think our ideas are likely to cost about £400 million. We know that for every pound we spend on early legal help we are likely to achieve savings of at least two pounds, and probably a lot more, further down the line because we will not be waiting, as we are now, for expensive disasters to happen before any public legal funding is available to try and avert them. The Government accepts the principle that savings would be made and that they should be taken into account, but it says on page 58 that it is too difficult to make any computation of all the benefits, so they do not try.

I will say something more now about what we described as 25 "urgent policy changes". The first ten are concerned with changing the eligibility and contribution rules. Some of them will have to be looked at, anyhow, because of what the Supreme Court has said in the Unison case. We wanted to get rid of a lot of expensive and time-wasting form-filling, and to make the rules as simple as possible. Here are three of our ideas:

1. The Government should introduce a much simpler and more generous scheme for legal aid. Everyone who receives a means-tested benefit should be automatically eligible without further assessment;

¹⁴ The Bach Commission/Sir Henry Brooke, 'Bach Commission on Access to Justice—Appendix 6—The History of Legal Aid 1945-2010' (<https://www.fabians.org.uk>, September 2017) <<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf>> accessed 11 August 2018

¹⁵ The Fabian Society, 'Bach Commission on Access to Justice—Appendix 7—Cost Implications and Potential Savings' (<https://www.fabians.org.uk>, September 2017) <<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-7-2.pdf>> accessed 11 August 2018

2. We want to see many more people qualify for legal aid, including people who are in a position to pay part of their legal costs;
3. The evidence requirements should be simplified and relaxed, to prevent people from being forced to abandon their applications for legal aid, as they do now.

Then here are five of our ideas about widening the scope of legal aid:

1. Legal aid should be restored for early legal help (not representation) to pre-LASPO levels for all social welfare law and family law cases;
2. All matters concerning legal support for children should be brought back into scope;
3. Legal representation in court should be restored for six particularly worrying categories of private law family cases;
4. Legal representation should be available at inquests where the state is funding other parties. Intrusive inquiries into the means of the deceased's family should be stopped;
5. The exceptional case funding scheme needs urgent review and reform.

We had these ideas about the administration of legal aid:

1. The Legal Aid Agency should be scrapped and replaced by an independent public body, with a broad-based group of directors;
2. Legal aid providers should not be plagued by so many different audits—one would be sufficient;
3. People should not be forced to use the telephone to access some types of legal aid;
4. The Government should commission an independent review into the long term viability of legal aid practice. Legal aid practitioners are now ageing and are not being adequately replaced.

And finally we said that positive steps must be taken to boost public legal education, both in schools and for adults; accurate online information should be easily accessible and sign-posted; and the Low

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Commission's recommendations for a ring-fenced fund for advice providers at local level should be implemented.

There is nothing revolutionary in any of this. We will all be happy to answer questions. I hope that the quality of our work will attract more and more public trust, and that it will be regarded as an essential foundation for all the interesting discussions about the best way forward that are just getting under way.

The LASPO Review: (2) My address to the Bar Conference

There are just a few moments in life that one will never forget. I had this experience today when I was going back to my seat after addressing the Bar Conference for ten minutes before lunch, when the chair of the conference encouraged me to turn left and look at the audience, and I saw, to my amazement, that I was receiving a standing ovation. Many nice things have been said subsequently about my talk, both among the Twitterati and elsewhere.

I am republishing the address below, more or less as delivered. My overriding message today was to encourage more and more people, both lawyers and non-lawyers alike, not only to study the Bach Commission's Report on The Right to Justice, but also, and perhaps more particularly, Appendix Five to the report, which contains a detailed analysis of critical parts of the evidence we received.

No fair-minded person could read Appendix 5 without being very seriously worried about the condition of justice today—for the millions of people who rightly expect the courts to deliver even-handed justice when they need it.

Before I republish the text of my address, here is a slightly longer excerpt from the totally unsolicited message I received recently from an unknown, but very experienced, district judge to which I referred in my talk:

Every day in the family court with so many unrepresented litigants is a living nightmare. So very many have mental health, drug, language, learning difficulties. I can no longer do justice or protect the vulnerable child or adult—I am in despair.

How can it be equality of arms when only the person alleging abuse (which may be false) in a domestic violence / sexual abuse case gets legal aid. This leaves the unrepresented unable to properly prepare or present their case. I weekly have to deal with people unable to pay for totally necessary drug, alcohol, DNA testing and psychological assessment/treatment.

Then if there is an advocate they end up doing all the work and in effect representing both sides.

There is the repeated unresolved issue of alleged unrepresented perpetrators and their cross-examination of alleged victims.

I count off the days to retirement- I would leave if escape wasn't so near. I am in excellent health and would have stayed on many years longer.

Until the last eight years all areas of the legal system, to which as a barrister and judge I was so proud to belong, were advancing in dispensing justice but now we go ever more backwards.

The morale of judges and staff is on the floor for a multitude of reasons. No one has hope.

The ball is now firmly in Parliament's court. The facts are there for all to read.

My address to the Bar Conference on 4th November 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. I have been asked to talk about this today. We heard 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.¹⁶ 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 in Appendix 5¹⁷ of the evidence we received on most of the critical issues. Nobody could read that 100-page 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 as 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.

¹⁶ The Bach Commission, 'Fabian Policy Report: The Right to Justice. The final report of the Bach Commission' (Bach Commission, September 2017) <<https://fabians.org.uk/publication/the-right-to-justice/>> accessed 11 August 2018

¹⁷ The Bach Commission/Sir Henry Brooke, 'Bach Commission on Access to Justice—Appendix 5—An Analysis of the Evidence' (<https://www.fabians.org.uk>, September 2017) <<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-5-FINAL-1.pdf>> accessed 11 August 2018

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 6¹⁸ to the report, you will see that the rot set in long before LASPO passed into law.

Because of time constraints I am limiting 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

¹⁸ The Bach Commission/Sir Henry Brooke, 'Bach Commission on Access to Justice—Appendix 6—The History of Legal Aid 1945-2010' (<https://www.fabians.org.uk>, September 2017) <<https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf>> accessed 11 August 2018

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. The Government does not dispute the potential for savings like this.¹⁹

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

¹⁹ See LASPO Act 2012: Post-Legislative Memorandum, Submitted to the Justice Select Committee on 30 October 2017, 57–59

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655971/LASPO-Act-2012-post-legislative-memorandum.pdf> accessed 11 August 2018

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. This figure is not disputed.²⁰

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 and swimming and doing all sorts of other things to raise money for justice, but *pro bono* help will never be enough.

²⁰ *ibid*, Figure 10, 52

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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. As I move onwards through the ninth decade of my life, I will be happy to do all I can to help.

Sir Henry Brooke
November 2017